No. 84-1023

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR FERNANDO ROJAS-CONTRERAS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the 18 April 1983 arraignment of respondent under a superseding indictment filed by the government on 15 April 1983 activated the provisions of the Speedy Trial Act, 18 U.S.C. § 3161(c)(2) which prohibited commencement of trial within 30 days of arraignment without the written consent of respondent?

2. Whether the completion of the sentence imposed upon respondent and his return to Mexico renders the case moot?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The oral ruling of the trial court which denied the demand of respondent that his trial not commence within 30 days of his 18 April 1983 arraignment under the superseding indictment is unreported.

JURISDICTION

The judgment of the court of appeals was entered on 2 March 1984. (Pet. App. 1a-2a). On 26 September 1984 petition for rehearing was denied (Pet. App. 5a). On 17 November 1984 the time within which to file a petition for a writ of certiorari was extended by Justice Rehnquist to and including 26 December 1984. On 26 December 1984 the petition for a writ of certiorari was filed. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 3161(c)(1): In any case in which a plea of

not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs....

18 U.S.C. § 3161(c)(2): Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

STATEMENT

On 18 February 1983 a two-count indictment was filed in the United States District Court for the Southern District of California, charging respondent with felony illegal entry into the United States in violation of 8 U.S.C. § 1325 and being found in the United States after having been deported, in violation of 8 U.S.C. § 1326 [C.R.3].[1/] Count One charged respondent with entering the United States illegally on or about 13 February 1983 after having been convicted of entering the United States illegally, which conviction occurred on or about 17 December 1981 [C.R. 3] Trial was scheduled for 19 April 1983.

On 18 April 1983 respondent was arraigned on a superseding indictment filed 15 April 1983. The 15 April 1983 superseding indictment charged felony illegal entry into the United States and having been found in the United States after having been deported [C.R. 8]. However, Count One of the superseding indictment charged respondent with having entered the United States illegally on or about February 13, 1983 after having been convicted of entering the United States illegally, which conviction occurred on or about 7 December 1981 [C.R. 8].

At the 18 April 1983 proceedings counsel for the government requested that respondent be arraigned on the superseding indictment. When the court inquired if counsel who had been appointed to represent respondent had received a copy, appointed-counsel acknowledged the receipt of a copy and waived further reading of the indictment [R.T. 5] [2/] The court then informed respondent that a superseding indictment had been filed charging him with felony illegal entry and being

1/ "C.R." refers to the Clerk's Record.
2/ "R.T." refers to the Reporter's Transcript.

a deported alien found in the United States. The court (clerk) also advised respondent that he was entitled to have a trial by jury, to be represented by counsel at all stages of the proceedings, and to have witnesses summoned to testify in his behalf. Respondent then entered a not guilty plea to each of the two counts [R.T. 5-6].

The court then stated: "Okay. This matter is set for trial tomorrow" [R.T. 6]. Counsel for respondent, citing the decision of the Ninth Circuit Court of Appeal in United States v. Arkus, 675 F. 2d 245 (9th Cir. 1982), and its interpretation of 18 U.S.C. § 3161(c)(2), entered a demand that trial not commence for 30 days [R.T. 6, 9]. The demand that the trial not commence for 30 days from the arraignment under the 15 April 1983 superseding indictment was denied [R.T. 23-25, Pet. App. B, 3a-3b].

On 19 April 1983 trial commenced under Count One of the 15 April 1983 indictment. Respondent was convicted and the court of appeals reversed without oral argument in a 2 March 1984 unpublished memorandum [Pet. App. A, 1a-1b]. The court below held that respondent was under the Speedy Trial Act [§ 3161(c)(2)] entitled to 30 days from the date on which he first appeared under the indictment on which he ultimately went to trial and that any pretrial preparation period shorter than thirty days was inadequate per se [Pet. App. A at 2a].

ARGUMENT

1. The 18 April 1983 arraignment of respondent under the superseding indictment filed by the government on 15 April 1983 activated the provisions of the Speedy Trial Act, 18 U.S.C. § 3161 and prohibited commencement of trial within 30 days of arraignment without the written consent of respondent.

In its enactment of the Speedy Trial provisions Congress unequivocally provided:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs..... 18 U.S.C. § 3161(c)(1).

It is not disputed that the superseding indictment in this

case was filed on 15 April 1983 and that respondent was arraigned and entered a not guilty plea on 18 April 1983 just one day prior to the date that trial had been scheduled under the 18 February 1983 indictment.

Title 18, U.S.C. § 3161(c)(1) provides: "In any case in which a plea of not guilty is entered...." Here the "not guilty" plea of respondent was entered on 18 April 1983. While that "not guilty" plea was to the superseding indictment filed by the government on 15 April 1983, the language of Congress does not distinguish between a "not guilty" plea to an information, indictment, or superseding indictment. Consequently, the 18 April 1983 "not guilty" plea of respondent was within the ambit of a "not guilty" plea entered "In any case" as set forth by Congress under § 3161(c)(1).

Congress further provided:

> "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." 18 U.S.C. § 3161(c)(2).

Prior to the entry of the "not guilty" plea by respondent on 18 April 1983, he was advised, inter alia, that he was entitled to be represented by counsel at all stages of the proceedings. He was not advised that he had the right to waive counsel and proceed pro se. Had respondent been advised of his right to waive counsel, he could have done so and proceeded pro se. He then would have been entitled to not have his trial commence for less than thirty days from that date under § 3161(c)(2).

Here, however, previously appointed counsel invoked the provisions of § 3161(c)(2) that the trial not commence less than 30 days from the 18 April 1983 "not guilty" plea [R.T. 6, 9]. That request was denied and trial commenced the following day [R.T. 23-25, 33]. Although court-appointed counsel had appeared for respondent prior to the 18 April 1983 arraignment and "not guilty" plea, that appearance was not under the 15 April 1983 superseding indictment.

As the court below held, respondent was entitled to 30 days from the date of his 18 April 1983 arraignment and "not guilty" plea. Section 3161(c)(2) provided him that right. The Fourth Circuit Court of Appeals has said of § 3161(c)(2):

> "What section 3161(c)(2) does is simply to guarantee to the criminal defendant the right to a delay of at least 30 days between arraignment and trial in any circumstances. This guarantee is in addition to or supplementary to any other rights that the defendants may have under recognized principles for a continuance beyond those thirty days as given him by § 3161(c)(2)." United States v. Wooten, 688 F.2d 941, 951 (4th Cir. 1982).

Here respondent entered his "not guilty" plea on 18 April 1983 and was tried the following day under the superseding indictment filed by the government on 15 April 1983. Respondent had been represented by counsel under the previous indictment. However, he first appeared through counsel under the superseding indictment on 18 April 1983. Consequently, he was entitled to have his trial not commence for less than thirty days from 18 April 1983.

2. The completion of the sentence imposed upon respondent and his return to Mexico renders the case moot as to him.

In Lane v. Williams, 455 U.S. 624 (1982), this Court discussed two exceptions to the mootness doctrine: The "collateral consequences" exception and the exception which arises from violations which are "capable of repetition, yet evading review." This case falls outside those exceptions. Respondent has served fully the sentence imposed upon him in this case.

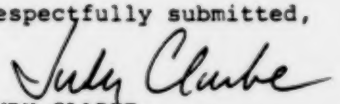
It cannot be said that the government will suffer any type of collateral consequences or that the issue presented in the petition for the government is "capable of repetition, yet evading review." See Williford v. United States, ___U.S.___, 105 S. Ct. 270 (1984), denying cert., where the question of the renewal period under § 3161(c)(2) was presented. Although Williford v. United States involved certiorari sought by the defendant, the issue was the same as in the instant case where it is the government who seeks certiorari.

Here, also, the government has returned the Respondent to Mexico after the completion of the sentence imposed in the instant case. The same doctrine of mootness enunciated in Lane v. Williams should apply to the instant case.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,



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